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Collective bargaining of 'self-employed' musicians under the scrutiny of EU competition law

Posted on January 13, 2015 by Ilektra Antonaki in Public Law

In its FNV decision, the Court recognised the right of 'self-employed' musicians to conclude collective labour agreements on the condition that they are in a situation comparable to that of 'employees'. What does this actually mean for workers' protection?

In 2006, a collective labour agreement laying down minimum fees for 'employed' and 'self-employed' musicians substituting for members of an orchestra was concluded in the Netherlands. However, it was terminated shortly afterwards, as the Dutch Competition Authority was of the opinion that it was anti-competitive under Article 101 (1) TFEU. The national proceedings initiated by the trade union led to a request for a preliminary ruling to the Court of Justice of the European Union, which surprisingly asserted its jurisdiction despite the lack of any cross-border element.

As to the substance, the Court emphasised that in view of their social policy objectives, collective labour agreements fall outside the scope of Article 101 (1) TFEU. Does this reasoning, however, apply to collective agreements covering 'self-employed' persons? The answer depends on their nature and purpose.

With respect to their nature, agreements concluded in the name and on behalf of 'self-employed' service providers do not constitute the result of a collective negotiation between employees and employers and thus, they are not excluded from the scope of Article 101 (1) TFEU. However, what happens if those service providers are 'false self-employed', in the sense that they are actually in a situation comparable to that of 'employees'? Here the Court departed from the formalistic approach of the Dutch Competition Authority and recognised the sensitive nature of the issue. In today's economy, 'self-employed' persons find themselves in a very precarious professional situation. Their independence is often merely notional and disguises an employment relationship. Against the current backdrop of increased unemployment and growing uncertainty, 'false self-employment' is widely used as a method of shifting the burden of the risks associated with employment from the employer to the employee and of excluding workers from welfare benefits.

With respect to their purpose, those agreements contribute to the improvement of the employment and working conditions of the 'false self-employed' persons.

Thus, a collective labour agreement covering 'self-employed' persons who are actually in a situation comparable to that of 'employees' (i.e. for a certain period of time they perform services for and under the direction of another person in return for which they receive remuneration) should be exempted from the scope of Article 101 (1) TFEU. It was, however, for the national court to ascertain whether this was actually the case for the 'self-employed' musicians in question.

Although the case could be hailed as a more prudent approach to the long-standing conflict between collective bargaining and competition law, the social problem still remains. Irrespective of the 'false' nature of the self-employment, collective labour agreements setting minimum fees for persons working in particular in the arts sector, such as musicians and actors, guarantee a decent level of social protection. They offer a safety net against potential abuses in the labour market and they improve substantially the working conditions of this vulnerable group. It would therefore be unreasonable to equate them with cartels and anti-competitive behaviour. As a final note, it is regrettable that any discourse on collective bargaining as a human right was missing.